No. 82-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID SCHULZ,

Appellant,

vs.

ROCKWELL MANUFACTURING COMPANY,
ROCKWELL INTERNATIONAL CORPORATION,

Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

BERNARD P. REESE, JR.
REESE, REESE & BAGLEY
979 North Main Street
Rockford, Illinois 61103
(815) 968-8851
Attorney for Appellant

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0223

QUESTION PRESENTED

Is Illinois Supreme Court Rule 323(c) as amended instanter by the Appellate Court of Illinois Second District in its written opinion with retroactive application and approved by the Supreme Court of Illinois repugnant to the due process and equal protection clause of the Federal Constitution?

The corollary issues of reversal on alleged evidence extrinsic to the trial court record, depriving appellant of proper notice and hearing, and failure to obtain a true record from the trial court are included herein.

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OPINION BELOW

The Opinion of the Appellate Court of Illinois Second District is set out in Schulz v. Rockwell Manufacturing Co. 108 Ill.App.3d 113, 438 N.E.2d 1230, 63 Ill.Dec. 867 (1982).

JURISDICTIONAL GROUNDS

NATURE OF PROCEEDING

This is a civil action brought by plaintiff David Schulz, a 19 year old boy, against defendant Rockwell Manufacturing Co. for severe and permanent injury resulting from the use by plaintiff of a product manufactured by defendant resulting in a jury verdict on November 5, 1980 in the 17th Judicial Circuit of the County of Winnebago and State of Illinois in the amount of $400,000 in favor of plaintiff.

The Appellate Court of Illinois Second District found the evidence supported the verdict and that the trial record was without error, but reversed on the grounds of possible jury prejudice with one judge dissenting. (Appendix A-31-36).

DATE OF JUDGMENT AND ORDER BELOW

A. Final Judgment of the Supreme Court of Illinois in denying a Motion to Rule on the Appeal as a Matter of Right - February 17, 1983 (Appendix A-42);

B. Judgment of the Supreme Court of Illinois in denying a Petition for Rehearing - January 19, 1983 (Appendix A-43);

C. Judgment of the Supreme Court of Illinois in denying an Appeal as a Matter of Right or in the Alternative Petition for Leave to Appeal - November 30, 1982 (Appendix A-47);

D. Judgment of the Appellate Court of Illinois Second District in denying a Petition for Rehearing or in the Alternative for a Certificate of

Importance - September 2, 1982 (Appendix A-44);

E. Judgment of the Appellate Court of Illinois Second District (with one judge dissenting) reversing the ruling of the trial judge in sustaining a judgment in favor of the plaintiff in the amount of $400,000 - July 16, 1982 (Appendix A-30-A41);

F. A Notice of Appeal to the United States Supreme Court was filed on April 11, 1983 in both the Supreme Court of Illinois and the Appellate Court of Illinois Second District (Appendix A-48,49);

STATUTORY PROVISION OF JURISDICTION

This Court has jurisdiction of this appeal under the provisions of 28 U.S.C. section 1257(2).

CASES SUSTAINING JURISDICTION

The judgment of both the Appellate Court and the Supreme Court of Illinois in refusing to rule on the assertion of the appellant that he had been denied procedural due process under the constitution is a holding in favor of the validity of the modification of the Illinois Supreme Court Rule 323(c) as against the assertion by the appellant that such modification as to appellant was repugnant to the due process clause.

The principles governing appellate review to this court seem clear that this court treats failure or refusal to decide as equivalent to a determination of validity. See e.g., Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932); Herndon v. Georgia, 295 U.S. 441 (1935).

The question respecting the validity of the modified Illinois Supreme Court Rule 323(c) first arose from the unanticipated opinion of the Appellate Court of Illinois Second District giving to said Rule 323(c) a new construction by way of an "exception" which threatened rights of the appellant under the constitution. There is no doubt that the federal claim is timely raised if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. See e.g. Saunders v. Shaw, 244 U.S. 317, 320 (1917); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79 (1930); Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 677-78 (1930).

In Henry v. Mississippi, 379 U.S. 443, (1965), Justice Brennan stated that the Court had consistently held that whether default in compliance with state procedural rules could preclude this Court's consideration of a federal question was itself a federal question. The Court referred to the opinion of Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) and quoted Justice Holmes who said:

> When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail.... Whether the right was denied or not given due recognition by the [state court] ...is a question as to which the plaintiffs are entitled to invoke our judgment. (Love v. Griffith, 266 U.S. 32, 33-34 (1924)).

As Justice Van Devanter in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67

(1928) said:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intent that this was done, the claim is to be regarded as having been adequately presented. (footnote).

It has been consistently held that state procedural requirements which do not satisfy due process clearly cannot bar Supreme Court review. See Reece v. Georgia, 350 U.S. 85, 89-90 (1955). It has been further underscored by this Court that unfairness or unsubstantiality may also be established by a demonstration that the state courts had not previously applied their stated rule "with the

pointless severity" shown in regard to the federal issue. See e.g., Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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1. Amendment XIV, Sec. 1, Constitution of the United States of America, (Appendix A-50).
2. Ill. Supreme Court Rules 321 (Appendix A-50), 323 (Appendix A-51, 52), 329 (Appendix A-53), and 66 (Appendix A-53,54)(Ill.Rev.Stat. ch. 110A §§ 321, 323, 329 and 66)
3. Ill.Rev.Stat. ch. 37, § 35 (Appendix A-55).

STATEMENT OF THE CASE

I.

Appellant, a 19 year old boy, was severely injured and lost a major portion of his right hand in 1975 while using a product manufactured by the defendant, Rockwell Manufacturing Co. An initial complaint was filed on January 21, 1977. After a trial on the merits a jury returned a verdict in favor of plaintiff-appellant and against defendant-appellee, Rockwell Manufacturing Co. on November 5, 1980 in the amount of $400,000. No transcript of the voir dire was taken.

II.

The name of the defendant, Rockwell Manufacturing Co., was utilized in all of the pretrial proceedings (Rec. C-2 through

C-255) and was the only name used at the commencement of the trial of this case (R.P. 317, 318, 319, 320). The name Rockwell International first occurred during the course of the trial (R.P. 136). It was not made a party to the litigation until after the jury verdict. The court was not advised pursuant to the provisions of Illinois Supreme Court Rule 66 that any other person or corporation might be affiliated with or have an interest in the outcome other than Rockwell Manufacturing Company.

III.

Following the verdict the defendant filed its post-trial motion on December 2, 1980 (Rec. C-318) alleging trial court error. On December 4, 1980 a supplement to the post trial motion was filed by

defendant (Rec.C-326) and a second supplement on December 5, 1980 (Rec. C-329). The supplemental post-trial motions alleged juror misconduct on voir dire but were unsupported by any transcript of the voir dire or "bystanders report".

IV.

On February 9, 1981, a little over three months after the trial, the defendant filed a brief in support of its post-trial allegation of juror prejudice and attached an affidavit of one juror, Marie A. Mayfield, and affidavits of employees of Rockwell International Co., Charles Banks, Janice Liskey and Lawrence G. Champion.

V.

On June 11, 1981 the trial judge denied defendants post-trial motion. The trial

judge stated there was no transcript of the voir dire, and further specifically rejected defendant's affidavits dehors the record as either accurately reflecting the voir dire or supporting the allegation of prejudice. The trial judge found no false statements on voir dire and no prejudice.

The dissenting judge in the appellate court, Justice Van Deusen, noted the trial judge "specifically rejected defendant's contention that juror prejudice merited the granting of a new trial." (Appendix A-31).

VI.

Illinois Supreme Court Rules for appellate procedure were then activated. Defendant pursuant to those rules filed its Notice of Appeal on June 26, 1981. Illinois Supreme Court Rule 321 provides

what shall be contained in the Record on Appeal and including the Report of Proceedings prepared in accordance with Illinois Supreme Court Rule 323.

Illinois Supreme Court Rule 323 provides that a Report of Proceedings "shall include all the evidence pertinent to the issues on appeal."

Illinois Supreme Court Rule 323(c) provides that where no verbatim transcript of the evidence of the proceedings is obtainable, the appellant can prepare a "proposed Report of Proceedings" from the best available sources including recollection. It shall be served within 14 days after the Notice of Appeal is filed. Within 28 days after the Notice of Appeal is filed any other party may serve proposed amendments or his"proposed Report

of Proceedings." Within 7 days after that the appellant must present on notice his proposed report or reports and any proposed amendments to the trial court for settlement and approval. The trial court then holding hearings, if necessary, shall certify and order filed an accurate report of proceedings. The rule further provides: "Absent stipulation only the Report of Proceedings so certified shall be included in the Record on Appeal."

On July 31, 1981 in the absence of the chief trial judge, the Honorable Robert C. Gill, before whom the case was tried, Defendant presented his Report of Proceedings to the Honorable Harris V. Agnew for approval, who approved said transcript as being and containing "the entire report of proceedings" at the trial

of said cause. The Report of Proceedings did not contain a transcript of the voir dire, nor the alleged affidavit of the juror, Mayfield.

VII.

No effort whatsoever was made by defendant to present the trial judge with a substitute for the Report of Proceedings covering the voir dire (known as a "bystanders report"); nor was any notice served upon plaintiff-appellant regarding a substitute for the voir dire whatsoever as required by the rules; nor was any hearing requested of the trial judge for such purpose as required by the rules. A footnote to Supreme Court Rule 323 as it appears in the Smith-Hurd Illinois Annotated Statutes, ch. 110(A) sec. 323, p. 57 states: "A properly authenticated

Report of Proceedings cannot be contradicted by the parties on appeal, and to quote the language often used in the opinions, 'imports absolute verity and is the sole, conclusive, and unimpeachable evidence of the proceedings in the trial court.' People v. Spence 133 Ill.App.2d 171, 172, 272 N.E.2d 739, 741 (1971) (emphasis furnished)."

VIII.

The appellee here in its appeal to the Appellate Court of Illinois Second District presented to that court the affidavits dehors the record which contained the alleged evidence extrinsic to the record as the sole basis for reversing the trial judge on the grounds of juror prejudice.

IX.

Illinois Supreme Court Rule 329 provides that: "The Record on Appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule."

The rule goes on to state that any controversy would be submitted to the trial court and settled so that the record would be "made to conform to the truth."

X.

Mandamus is the proper remedy to compel a trial judge to complete and certify a record. Ill.Rev.Stat. ch. 37, sec. 35. (Appendix A55).

XI.

The appellate court held there was no error in the trial court and that the evidence supported the verdict. Justices Lindberg and Hopf, however, over the

vigorous dissent of Justice Van Deusen reversed appellant's judgment of $400,000 on the grounds that one juror "may have lied" on voir dire.

They reached that conclusion without a transcript of the voir dire but rather on the lone affidavit of the one juror, Marie Mayfield, in lieu of an approved Report of Proceedings or "bystanders record" as required under Illinois Supreme Court Rule 323(c). They held that said Rule 323(c) was not the exclusive means by which proceedings before the trial judge including voir dire, could be presented for purposes of review. The appellate court held the facts before it warranted special consideration and therefore were within an "exception" to said Rule 323(c).

They held that factual allegations

which were contained in these affidavits dehors the record, even though specifically disapproved and contradicted by the trial judge himself, must be accepted as true.

The two cases cited in their opinion in support of this were not in point. Those cases affirmed the trial judge and his view of the record and did not permit a consideration of alleged extrinsic evidence nor permit reversal on evidence dehors the record.

XII.

The appellate court stated the trial judge should have held a hearing, but itself did not remand for such a hearing as specifically provided for in Supreme Court Rule 329 and further denied the filing of counter affidavits which

Plaintiff sought to file in the appellate court along with his Petition for Rehearing.

The Illinois Appellate and Supreme Courts both totally ignored the assertion that mandamus under Ill.Rev.Stat. ch. 37, sec. 35 was in any event the appropriate remedy for the defendant Rockwell.

XIII.

The dissenting Judge Van Deusen noted in his dissent: (Appendix A33,A37)

> On appeal the defendant has failed to file a transcript, a factual stipulation or a bystanders report of the voir dire proceedings as required by Supreme Court Rule 323. (73 Ill.2d R. 323.) Defendant has instead attempted to establish a right to a new trial by a set of affidavits.
> Only one affidavit, that of Marie Mayfield, refers to the voir dire examination. Other than this affidavit, this court of review has no other record of the proceedings at the voir dire or during jury deliberations. (emphasis added).

The dissenting judge went on to say the appellate court had no "opportunity to examine a report of the voir dire proceedings." (Appendix A37)

HOW QUESTION PRESENTED

1. Since the appellate court "amended" the existing Illinois Supreme Court Rule 323(c) by creating instanter an "exception" thereto contrary to all precedent in the State of Illinois, this basis for the judgment of the appellate court could not be anticipated by the appellant. An immediate Petition for Rehearing or In the Alternative a Certificate of Importance filed with the appellate court contained point III entitled "PLAINTIFF IS DENIED DUE PROCESS BY THE MAJORITY OPINION" wherein it was stated:

> By defendant's violation of procedural requirements for appellate review with acquiescence by the majority opinion, Rule 323(c) achieved substantive proportions and Plaintiff is deprived of his judgment without due process.... Retroactive application by the majority of a procedure permitting a post-trial motion with attached affidavits to be considered in lieu of a certified bystander report deprives Plaintiff of a right crucial to the issues.... Hogan v. Bleeker, 29 Ill.2d 181, 193 N.E.2d 844 (1963), held even procedural or remedial statutes are not construed retroactively so as to deprive one of a vested property right.
>
> . . . .
>
> Failure to afford Plaintiff the right under Rule 323(c) is a denial of due process under the Constitution.

2. That Petition for Rehearing was denied by judgment of the appellate court on September 2, 1981. (Appendix A-42).

3. Thereafter a Petition for Writ of Mandamus was filed with the Supreme Court of Illinois wherein appellant alleged that

the majority opinion was a "denial of due process to plaintiff" and should be corrected by the issue of a writ of mandamus. This Petition was denied on October 13, 1982. (Appendix A-43).

4. Appellant filed with the Supreme Court of Illinois a Petition for Appeal as a Matter of Right or In the Alternative Leave to Appeal. This petition was denied November 30, 1981. (Appendix A-44). The ground of right was premised on the fundamental issue of denial of procedural due process.

The Supreme Court of Illinois subsequently denied a Petition for Rehearing on January 19, 1983 (Appendix A-45) and a Petition for a Ruling on the Appeal as a Matter of Right on February 17, 1983 (Appendix A-45). In both

petitions, appellant claimed a denial of due process and equal protection under the provisions of the 14th Amendment of the Constitution of the United States.

THE QUESTION PRESENTED IS SUBSTANTIAL

This case presents substantive issues of great magnitude. Procedure and content have been the warp and woof of appellate practice. An accurate and approved record of the proceedings in the trial court has thus been the citadel which has enabled continuity, certainty and justice in our system of jurisprudence to survive.

The dissenting opinion of Justice Van Deusen is the most eloquent illustration of the impact this ruling can have on cases yet to be tried, both civil and criminal, state and federal.

In opposition to the clear import of

the Illinois Supreme Court Rule in question, and the legion of cases that comport with that rule, it is a dangerous deviation that would permit an upper court to reach conclusions contrary to the actual proceedings that occurred in the trial court. It is the "camels head" that is the harbringer of erratic decisions outside the record.

A significant by-product of this classic illustration of disregard for the individual's right of due process is the foreboding portent of jury harrassment which represents a threat to both the state and federal judiciary. As our supreme court advocated in Chalmers v. City of Chicago, 92 Ill.App.3d 54, 415 N.E.2d 508, 47 Ill.Dec. 503, 506 (1980), in denying the use of affidavits by jurors

supplied after trial:

> "We foresee serious dangers in permitting ex parte communications between the unsuccessful litigants and the jurors in order to persuade them that the recorded verdict was not the verdict agreed upon. The possibility of the harrassment of jurors in attempts at persuasion or bribery could result in serious damage to our trial by jury system."

Those important aspects of public policy reflecting from the due process considerations which were involved in Saunders v. Shaw, 244 U.S. 317 (1917) and in Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930) are present here. In the latter, relief was denied by the state appellate court for failure of appellant to resort to an administrative remedy even though earlier decisions held the state administrative body lacked the power to award and that it was then too late to pursue.

This court viewed the action of the highest state court in both cases as a deprivation of the right to a hearing constituting a denial of due process. The point in Brinkerhauf-Faris Trust and Savings Co. v. Hill, supra, was raised only on Petition for Rehearing in the state court.

The principles involving substantial public interest which excited this courts appellate jurisdiction in the foregoing two cases, as well as the cases previously cited herein, are embodied in the question presented in the instant case.

In substance, while not being deprived of his freedom, appellant has been deprived of the money judgment which is a very poor substitute for his right hand. The decision of the state court here is

totally unsupported by any admissible evidence whatsoever, only alleged evidence extrinsic to the record. While not in accord on the facts whatsoever, and involving a criminal case as opposed to a civil case, the issue involved is somewhat reminiscent of the principle that prompted this court to review and reverse without dissent in Thompson v. City of Louisville, 362 U.S. 199 (1960).

The very basic principles of even horn book rules of evidence were violated by the appellate court. Hearsay evidence is not permitted because of the inability to controvert the devastating effect of accusations generated by either inaccurate information or outright lies. Here both the Appellate Court of Illinois and the Supreme Court of Illinois utilized this

alleged evidence extrinsic to the record but specifically rejected by the trial judge, to find that jurors "may" have lied on voir dire and prejudice "may" have resulted. The victim of these "may have's" is the hapless appellant. While appellant argues the record did not justify any decision but affirmance of the trial judge, the very least to which appellant was entitled under due process was a remand under Illinois Supreme Court Rule 329 for a hearing to establish a complete and true record.

The appellate court not only rejected counter affidavits filed by appellant here with his Petition for Rehearing, but while criticizing the veteran chief trial judge for denying a hearing (which the record clearly indicates he did not deny) - the

appellate court did not remand for a hearing on the allegations of the defendant. Instead of a hearing on evidence then less than two years old, they reversed which requires Plaintiff to totally retry and sustain his burden of proof in this case on evidence from 1975. Not for lack of evidence or error in the trial of Plaintiff-Appellant's case, but on the outside "chance" based on alleged extrinsic evidence that prejudice "may" have occurred. This is certainly inconsistent with the result reached by the California Supreme Court in Ford Motor Co. v. Hasson, 32 Cal.3d 388 (1982), in which this Court denied certiorari (11 U.S.L.W. 1139).

Due process is at once both mystical and practical, illusive and specific, historic and innovative. All will agree,

however, that its ultimate objective is to transform the apparent victorious shouts of tyranny into hollow echoes of defeat in order to create and maintain the magnificent aura of freedom which the founding fathers sought to achieve. Consequently, that concept was woven into the fabric of our constitution (due process and equal protection of the laws). As this Court noted in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982) in quoting Justice Jackson from Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Due process is an essential ingredient

of the fundamental doctrine that "all men are created equal."

A judicial atmosphere which lacks stable rules of procedure and possesses uncertainty in applicable universal principles is a breeding ground for societal chaos. In the text of Chief Justice Burger's annual report to the American Bar Association in Houston, Texas on February 8, 1981, he said: "Crime and the fear of crime have permeated the fabric of American life damaging the poor and minorities even more than the affluent. A recent poll indicates 46% of women and 48% of blacks are 'significantly frightened' by pervasive crime in America."

He went on to say that the time had come to commit vast social resources to the attack on crime - a priority com-

parable to the national defense. Chief Justice David L. Bazelon, Senior Circuit Judge for the United States Court of Appeals in the District of Columbia, said in a speech given at the 8th annual conference, Western Society of Criminology, in San Diego, California, February 28, 1981: "The nightmare of street crime is slowly paralyzing American society. Across the nation a terrified people have altered their lifestyles."

He referred to the speech of Chief Justice Burger saying:

> Some have questioned whether a sitting Chief Justice should advocate sweeping changes in the criminal justice system. Others have challenged his particular prescriptions. But I believe the prestige of his office has focused the nation's attention on issues critical to our future. We should welcome this opportunity to begin a thoughtful and constructive debate about our national nightmare.

The Chief Justice avers that some of the behavior problems in our society might be the consequences of having eliminated from public schools and higher education efforts "to teach values of integrity, truth, personal accountability and respect for others' rights." He quotes from Charles Mallack, former president of the U.N. Assembly, who said: "I search in vain for any reference to the fact that character, personal integrity, spiritual depth, the highest moral standards, the wonderful living values of the great tradition have anything to do with the business of the university or the world of learning."

It is contended there is a distinct correlation between the chaos in our society and the delay and uncertainty that

exists in our judicial procedure.

The instant case, we believe, illustrates the perhaps unconscious trend of this departure from established principles and standards on which one can rely contributing to our drift into that gray area of instability and confusion with its resulting chaos.

We respectfully contend the majority opinion also parallels those cases wherein because of the nature of the crime committed, a departure from the principles of due process was indulged in order to achieve a desired objective, with the result that on appeal this Court was required to reverse.

A judicial willingness to abrogate principles of due process in an effort to be "fair", because in the view of the

majority opinion here "if" the alleged extrinsic facts were true, prejudice "may" have resulted, has foreboding overtones for the future of our judicial system, particularly our jury system. Again, it involves the same sort of substance that prompted this Court to acknowledge appellate jurisdiction in the Illinois case of Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982) in which Zimmerman was deprived of a right by the Illinois Supreme Court without the opportunity for a hearing. The principles that motivated the Court's decision in Zimmerman, including the simple but eloquent support of the ultimate conclusion under the theory of equal protection by Justice Blackmun are applicable in the case at bar.

It is to be well noted that the appellant's interest in the due process clause for "life, liberty and property" are not state-created, and thus entitled to this Court's attention.

The dissenting opinion by Justice Van Deusen (Appendix A-30-A41) amply illustrates even without recourse to the record, that appellant here was without due process deprived of a judgment which was awarded in fair contest by a jury as a meager "quid pro quo" for appellant's right hand.

Appellant is entitled to the same protection of due process that has in memoriam been accorded to individuals in terms of procedure. The principle is reiterated in a case we cited to the Supreme Court of Illinois, Gorin v.

McFarland, 80 Ill.App.2d 398, 224 N.E.2d 615 (1967):

> The first cardinal rule of jurisprudence is that in every suit each party shall be accorded "due process." Fixed and specific procedure is provided by statute, rules of court and judicial decision as to the route to be followed which will assure each party that right of hearing. If these rules be not followed thereby denying that right, then the final decision of the court must, upon appeal, be reversed. The defendants contend they were denied the right to be heard. We are bound by what the record discloses. (emphasis supplied).

CONCLUSION

In Atkins v. Atkins, 393 Ill. 202, 65 N.E.2d 801 (1946), the Supreme Court of Illinois held that for the appellate court to seek to review affidavits as evidence, as they did in the instant case, constituted a violation of the due process provisions of the Constitution of the State

of Illinois and was outside their jurisdiction and held such attempted action invalid. The supreme court held Section 92 of the then Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110, sec. 216) as being unconstitutional in its attempt to permit that kind of action.

In a recent case out of this same appellate court (second district), In re Estate of Rice, 108 Ill.App.3d 751, 439 N.E.2d 1264, 64 Ill.Dec. 456 (1982), Justice Van Deusen, who wrote the dissenting opinion in this case, joined with Justices Nash and Reinhardt in finding that Illinois Supreme Court Rule 323(c) was inflexible; that there was no exception to the rule and that the only way the appellate court could rule on an issue was based upon an approved and

accurate record of the trial court proceedings which it was the responsibility of the appellant to provide. The opinion of the court in In re Estate of Rice, supra, illustrates, together with the dissent in this case, the absolute, patent denial of due process and equal protection which has been accorded appellant. The universal and historic principle that only a complete and accurate trial record on which to base appellate review is axiomatic and has been reiterated time after time. As in Coombs v. Wisconsin National Life Ins. Co., ___Ill.App.3d___, 67 Ill.Dec. 407, 408, 444 N.E.2d 643 (1982), wherein the court pointedly said:

> As the court in La Pierre v. Oak Park Federal Savings & Loan Assn, 21 Ill.App.3d 541, 546, 315 N.E.2d 908, 911-912 (1974), stated:
> "It is a basic principle of appellate practice that a party who

> brings a cause to a reviewing court must present in the record the proceedings to show the error complained of. [Citation]. [Appellant] has failed to provide this court with a report of proceedings or an acceptable substitute in accordance with Supreme Court Rule 323 (Ill.Rev.Stat. 1973, ch. 110A, par. 323). Accordingly, this issue, and others raised by [appellant] for which the evidence offered at trial would be necessary to our determination, is not subject to review by the court."

If a verdict is going to be overturned, or if this appellant's judgment is going to be contested or set aside, it should only be on the same standard which was initially required of appellant to prove his case by a preponderance of the evidence. A violation of those principles calls into jeopardy the very substance and foundation of our form of jurisprudence. It sets it on a humanistic level in which the circumstances will dictate the

decision, not the rules and not the precedents and not the moral integrity of our system of law. It becomes a matter of "fairness vs. justice"; and arbitrary and emotional "fairness" becomes the enemy of justice.

The application by the appellate court of Supreme Court Rule 323(c) as amended deprived appellant of his property without due process or equal protection as required by the Fourteenth Amendment of the Constitution.

We respectfully pray this Court will grant probable jurisdiction.

Respectfully submitted,

BERNARD P. REESE, JR.
979 N. Main Street
Rockford, Illinois 61103
Tel. (815) 968-8851

Attorney for Appellant

APPENDIX

108 Ill.App.3d 113

438 N.E.2d 1230

David SCHULZ, Plaintiff-Appellee,

v.

ROCKWELL MANUFACTURING COMPANY
Rockwell International Corporation,
Defendants-Appellants.

No. 81-474.

Appellate Court of Illinois,
Second District.
July 16, 1982.

Rehearing Denied Sept. 2, 1982

LINDBERG, Justice.

Plaintiff, David Schulz, brought an action for product liability in the circuit court of Winnebago County, asking damages for an injury which he claimed was caused by the unreasonably dangerous condition of a powerized miter box manufactured by defendant, Rockwell Manufacturing. The jury rendered a

verdict in favor of the plaintiff in the amount of $400,000. Rockwell appeals, claiming that the trial court erred in denying Rockwell's motion for a directed verdict; in giving instruction 11(a) proffered by plaintiff; and in failing to grant Rockwell's motion for a new trial on grounds of juror prejudice. The facts relevant to our disposition are as follows.

Plaintiff brought a claim under a product liability theory seeking damages for an injury he sustained while operating a powerized miter box manufactured by the defendant. At the time he sustained his injury, Schulz was using the powerized miter box to cut lengths of wood to be used in window frames. In order to do this, Schulz placed the wood on the table

and with his right hand brought the miter box's rotating blade down through the piece of wood. The blade is activated by use of a trigger located on a pistol-grip handle. Schulz had cut about 200 pieces, when he caught his right hand on the blade, severing his thumb and two fingers. Plaintiff claimed at trial that the saw portion of the miter box was defective in design and unreasonably dangerous because it did not have a wrap-around blade guard and was equipped with a manual brake instead of an automatic brake.

After the close of evidence, the judge held a jury instruction conference. Over defendant's objections, the judge agreed to give plaintiff's instruction 11(a) to the jury.

The jurors were instructed and

deliberated for approximately two hours. On November 5, 1980, the jury returned a verdict in favor of plaintiff in the amount of $400,000. On December 3, 1980, the attorney for defendant learned that the husband of one of the jurors, Ellen Bowers, had, in 1979, applied for employment at MGD Goss Printing, a division of Rockwell. He later filed a lawsuit against Rockwell under the Illinois Fair Employment Practices Act. On December 5, 1980, it was learned that another juror, Ed Benning, had been fired by Goss Printing in 1970. Defendant filed supplemental post-trial motions based upon these facts seeking an evidentiary hearing and/or a new trial due to the alleged prejudice of these jurors.

In support of these motions, defendant

presented affidavits concerning the employment record of the two men and the affidavit of one member of the jury. Janet Liskey, the employee relations representative for Rockwell, stated that Benning's termination report indicated that Rockwell was dissatisfied with his "effectiveness, attitude, and lack of respect for the work force and his fellow superiors." In a separate affidavit, Ms. Liskey stated that Steve Bowers was turned down for employment at Rockwell due to a back condition, that Mr. Bowers subsequently filed a charge against Rockwell with the IFEPC and that the charge was eventually resolved in favor of Rockwell. Ms. Liskey also testified by affidavit that Steve Bowers had listed the name of his wife as Ellen Bowers.

Marie A. Mayfield, one of the jurors, testified by affidavit that the attorney for Rockwell had asked each of the jurors in her group of four (which included Mr. Benning), if they had ever worked for Rockwell or if they had any contact or connection with Rockwell. She testified that all of the jurors in her group of four answered no to that question. She also testified that during deliberations Mr. Benning had offered the opinion that the plaintiff was entitled to an award of $2,000,000, and that plaintiff's injury would make it difficult for him to find other employment.

The court denied plaintiff's post-trial motions and also denied a motion by the plaintiff seeking pre-judgment interest. The defendant appeals and plaintiff cross-

appeals.

[1] During trial the defendant moved the court to grant a directed verdict on grounds that no evidence had been introduced tending to show that it was reasonably foreseeable that the plaintiff would forego the use of a safety feature built into the machine in question. The testimony adduced at trial indicates that the miter box was equipped with a manual coasting brake. The use of this brake would have, in all likelihood, prevented the injury complained of here. Plaintiff testified that at the time of the accident he was not using the coasting brake.

Expert testimony indicated that the design of the coasting brake was such that it had to be operated by applying pressure with the thumb. The firmer the pressure,

the more quickly the blade would stop. The expert testified that a fair degree of pressure was needed to stop the blade and that this would cause the operator's hand to become fatigued over the course of a work day. He further testified that it was predictable that the operator would not, under these circumstances, use the safety device. We find that this testimony was sufficient to allow the matter to go to the jury as the trial judge did in this case.

[2] A directed verdict should be entered only where it appears that "all of the evidence, when viewed in an aspect most favorable to the opponent so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand." Pedrick v. Peoria and

Eastern R.R. Co.(1967), 37 Ill.2d 494, 229 N.E.2d 504.

In essence, the defendant's motion for directed verdict invoked the doctrine of misuse. It is defendant's contention that the plaintiff's failure to utilize the thumb brake was the proximate cause of his injury and that the miter box provided, at most, a condition which allowed but did not cause that injury.

[3] Illinois law is clear that the conduct of an operator of machinery is a defense to a product liability action only where it is shown that such conduct amounts to a misuse which was not reasonably foreseeable by the manufacturer. (Anderson v. Hyster Co.(1979), 74 Ill.2d 364, 24 Ill.Dec. 549, 385 N.E.2d 690; Derrick v. Yoder (1980), 88 Ill.App.3d

864, 43 Ill.Dec. 897, 410 N.E.2d 1030.) In the absence of such proof, the causal connection between a defective machine and the injury remains unbroken. (Lewis v. Stran Steel Corp. (1974), 57 Ill.2d 94, 311 N.E. 2d 128.) Even a showing that plaintiff used the machine incorrectly or carelessly does not bar recovery where that use is reasonably foreseeable by the manufacturer. Lancaster v. Jeffrey Galion, Inc. (1979), 77 Ill.App.3d 819, 33 Ill.Dec. 259, 396 N.E.2d 648.

[4] Foreseeability is normally a question for the finder of fact. (DeArmond v. Hoover Ball & Bearing (1980), 86 Ill.App.3d 1066, 42 Ill.Dec. 193, 408 N.E.2d 771.) While a manufacturer is not expected to foresee every possibility which might conceivably occur, he is held

to a duty to foresee those uses which are objectively reasonable to expect. (Winnett v. Winnett (1974), 57 Ill.2d 7, 310 N.E.2d 1; Barr v. Rivinius, Inc. (1978), 58 Ill.App.3d 121, 15 Ill.Dec. 591, 373 N.E.2d 1063.) In Anderson v. Hyster Co., the supreme court addressed a situation similar to the one at bar. In that case a defendant argued that plaintiff's injury had resulted solely from the failure of a forklift operator to activate a foot brake. The court held that the expert testimony adduced at trial was sufficient to support a jury verdict for the plaintiff. That testimony included opinions to the effect that although the forklift was capable of being operated safely, various human factors made it likely that the operators would

become confused.

The case of Sanchez v. Black Brothers Co. (1981), 98 Ill.App.3d 264, 53 Ill.Dec. 505, 423 N.E.2d 1309, relied upon by defendant, held only that evidence should be admitted on the issue of possible misuse and did not set a standard for directed verdict in such a case or involve an assessment of the sufficiency of the evidence presented on this point. Nor does Flores v. U.S. Industries, Inc. (1980), 81 Ill.App.3d 944, 36 Ill.Dec.841, 401 N.E.2d 979, mandate reversal in this case. In upholding the trial court's order granting a directed verdict to defendant, the appellate court in that case commented on what it considered to be insufficient expert testimony. In this case, however,

the record contains sufficient testimony on the point of foreseeability to create a question of fact for the jury. The trial court correctly denied defendant's motion for a directed verdict.

[5] Defendant also appeals on the ground that plaintiff's instruction 11(a) should not have been given to the jury. Defendant contends that this instruction is overly broad and vague in its description of the alleged unreasonably dangerous aspects of the product. The instruction reads, in its entirety:

> "The plaintiff claims that he was injured while using the electric miter box and there existed in the electric miter box at the time it left control of the defendant a condition which made the electric miter box unreasonably dangerous in one or more of the following respects:
>
> A. There was a failure to design the machine in such a manner as to

avoid or minimize the risks to the users of said machine.

B. There was a failure to provide necessary safety features on said machine.

C. That the defendant knew or should have known the potential hazards of the use of the machine in its present condition by an operator and should have made adequate provision to protect the operator in that regard and failed to do so.

The plaintiff claims that one or more of the foregoing was a proximate cause of his injuries.

The defendant denies that any of the claimed conditions existed in the electric miter box at the time the machine left its control; denies that any claimed condition of the electric miter box made the machine unreasonably dangerous; denies that any claimed condition of the electric miter box was a proximate cause of the plaintiff's injuries; and

The defendant further denies that plaintiff was injured or sustained damages to the extent claimed."

[6] Instruction 11(a) is a summary of

the pleadings filed and the issues raised by both parties in this case. Such an instruction is proper so long as it is succinctly stated without undue repetition or undue emphasis. (Signa v. Alluri (1953), 351 Ill.App. 11, 113 N.E.2d 475.) In Signa, the appellate Court held that the practice of reading the entire complaint as an instruction to the jury constituted prejudicial error. The court noted that the sheer length of such an instruction could confuse a jury, but placed even more emphasis on the inequity of putting this one-sided version of a lawsuit into the mouth of the trial court.

In Mattyasovszky v. West Towns Bus Co. (1975), 61 Ill.2d 31, 330 N.E.2d 509, the supreme court commented on such an "issue" instruction which it found to be improper.

Emphasizing the need, in such an instruction, for conciseness and the absence of repetition the court noted:

> "The issue instruction in this case contained more than 700 words of direct quotation from the plaintiffs complaint. In that instruction each of the phrases 'negligently and carelessly' and 'with utter indifference to or conscious disregard for' was repeated eight times in describing the conduct of the defendant. This instruction was improper." 61 Ill.2d 31, 38, 330 N.E.2d 509.

Unlike the instruction discussed in Mattyasovszky the text of instruction 11(a) is a fair summary of the pleadings. It is not overly long, containing just over 200 words. Further, the defendant makes no reference to, nor did we discover, any point in the instruction which misconstrues or overemphasizes either set of pleadings.

A similar case was addressed by the appellate court in Gallee v. Sears Roebuck & Co. (1978), 58 Ill.App.3d 501, 16 Ill.Dec.56, 374 N.E.2d 831. There, the court upheld an instruction which read that the plaintiff claimed "he was using a ladder in a manner usual and customary and in a manner which was reasonably foreseeable by the defendant." (58 Ill.App.3d 501, 502, 16 Ill.Dec.56, 58, 374 N.E.2d 831, 833.) Commenting that the instruction did no more than inform the jury of plaintiff's claim and the defendant's response in a neutral tone, the court found no error.

Darby v. Checker Co. (1972), 6 Ill.App.3d 188, 285 N.E.2d 217 is offered by defendant as as case in which the appellate court reversed on the basis that

an instruction given was overly broad. However, careful reading of that case indicates that the court found prejudicial error in the giving of an instruction which assumed a fact in evidence when no evidence had actually been adduced on that point. The trial court did not err in giving plaintiff's proffered instruction in 11(a) in the case at bar.

[7] Upon ascertaining that two of the twelve jurors sitting in this case had had some contact with Goss Printing, a division of Rockwell International, defendant moved the court alternatively to allow an evidentiary hearing concerning the alleged jury improprieties and for a new trial. The defendant submitted affidavits including one from a member of the jury, in support of this motion. Plaintiff sub-

mitted no counter-affidavits. During arguments on the motion, the trial judge asked for briefs on the issues of how a record of the voir dire could be reconstructed and under what circumstances a jury may be impeached. Eventually, the court denied defendant's motion for a evidentiary hearing and for a new trial. It is defendant's contention that the court erred in refusing to conduct a hearing and to consider the submitted affidavits and further erred in its failure to grant a new trial.

Plaintiff, in his brief, raises a question as to whether the affidavits submitted by Rockwell can properly be considered by this court in assessing the need for a new trial on account of possible juror prejudice. Plaintiff cites

Supreme Court Rule 323(c) as the only method by which the events of the voir dire in this case may be reconstructed for the purposes of review. Rule 323(c) provides that:

> "If no verbatim transcript of the evidence of proceedings is obtainable, the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 14 days after notice of appeal is filed. Within 28 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports, and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal." Ill.Rev.Stat. 1979, ch. 110A, par. 323(c).

It is defendant's contention that the

trial court's refusal to grant an evidentiary hearing and its denial of subpoenas and discovery motions work to preclude the possibility of compiling such a bystander record. We agree. The dissent comments that there is insufficient evidence in the record to overcome the presumption of correctness which attaches to a trial court's decision. However, any deficiency in this record is attributable to the trial court's refusal to grant discovery or hold further hearings. We do not believe that the discretion vested in a trial court permits it to convert a presumption of correctness into an impenetrable cloak of infallibility. We are reluctant to deny review where a trial court by its own order has created an inadequate record.

The defendant further argues that the case law establishes that an appellate court may consider affidavits in lieu of a bystander record where an issue of juror prejudice is involved.

Our supreme court has reviewed allegations of prejudicial false testimony given during voir dire without recourse to either a verbatim transcript or a Rule 323 bystander report on two occasions. In Pekelder v. Edgewater Automotive Co., Inc. (1977), 68 Ill.2d 11 Ill.Dec. 292, 368 N.E.2d 900, the supreme court affirmed a trial court's order granting a new trial. The court relied on the trial court's recollection that it had asked each prospective juror whether he or she had any pending lawsuits and the juror's testimony at a post-trial hearing to the

effect that at the time of the trial he was a party to a lawsuit. Likewise, in Department of Public Works v. Christensen (1962), 25 Ill.2d 273, 184 N.E.2d 884, the court was without a verbatim transcript. The court noted that although the trial judge stated that he had no recollection of contents of voir dire, he accepted counsel's statement that each juror had been asked whether he had dealings with the State of Illinois. The court noted that an affirmative answer to such a question would not have disqualified a juror and declined in the absence of a more specific showing or perjury or prejudice to reverse the trial court's denial of a new trial. We note that Christensen predates Rule 323(c) and its predecessor, former Rule 36-1(c)

(Ill.Rev.Stat. 1965, ch. 110, par. 101.36(1)(c)). However, these rules served merely to codify the common law requirement, and so this case is of precedential value. See, Comments of the Illinois Supreme Court Rules Committee to Rule 36-1 (53 Ill.Bar J. 18, 1964)).

Plaintiff, in urging that a Rule 323 report is indispensable to review of this case, relies heavily on this court's opinion in Hehir v. Bowers (1980), 85 Ill.App.3d 625, 40 Ill.Dec. 918, 407 N.E.2d 149. In that case this court held that it could not determine whether a juror had lied in the absence of a transcription or "any substitute for a report of proceedings." (85 Ill.App.3d 625, 629, 40 Ill.Dec. 918, 922, 407 N.E.2d 149, 152.) The opinion makes no reference

to Rule 323(c) and thus implicitly admits, as do Pekelder and Christensen of other methods of recreating the voir dire. Here, the defendant has provided an affidavit of a juror who claims to recall the question regarding Goss Printing as well as affidavits substantiating the interested status of jurors Benning and Bowers. Defendant's affidavits were the only documents submitted to the court.

[8,9] In Pekelder, discussed earlier, the supreme court promulgated a two-part standard for the granting of a new trial due to false statements made by jurors during voir dire. A new trial is required if it is established (1) that a juror answered falsely on voir dire, and (2) that prejudice resulted therefrom. Both parts of the Pekelder test appeared to

have been met in this case. Further, if true, the affidavits presented by defendant give evidence of a situation with a much more powerful prejudicial potential than the fact situations in the case upon which plaintiff relies in opposing the motion for a new trial. For instance, in Pekelder, the court upheld a court order granting a new trial where a juror had liked about the fact that he was a party to a lawsuit. In Christensen, a false answer was given in response to a question as to whether or not the juror had had "dealings with the State of Illinois." In Kuzminski v. Waser (1942) 314 Ill.App. 438, 41 N.E.2d 1008, the juror answered falsely that she had not been involved in any auto collisions. The facts alleged here are strikingly

different. The affidavits presented by defendant suggest that two of the twelve jurors were pointedly biased against Rockwell in particular. Further, it seems that one of these jurors played a particularly active role in the jury deliberations. The factual allegations contained in these affidavits must be accepted as true in the absence of any counter-affidavits contradicting them. (Denton v. Enterprises, Inc. v. Illinois State Toll Highway Authority (1979), 77 Ill.App.3d 495, 32 Ill.Dec. 921, 396 N.E.2d 34; People v. Mickow (1978), 58 Ill.App.3d 780, 16 Ill.Dec. 306, 374 N.E.2d 1981). Nothing in the record before us supports the dissent's hypothesis that the trial court was relying on his own personal recollection of voir dire

to contradict those affidavits.

Accordingly, we remand for a new trial due to apparent prejudice on the part of two jurors in the original trial.

[10] In his cross-appeal, plaintiff contends that the trial court erred in denying his post-trial motion for pre-judgment interest dating back to the time of his injury. Illinois law provides for the recovery of pre-judgment interest in a tort action based upon fraud, trespass, or conversion, where there has been an unreasonable and vexatious delay of payment due. The Illinois state courts have not ruled on the availability of pre-judgment interests in personal injury actions. However, the Court of Appeals for the Seventh Circuit, ruling in a wrongful death action, interpreted

Illinois law as allowing pre-judgment interest only where called for by statute or by agreement of the parties. (In re the Aircrash Disaster Near Chicago (7th Cir. 1981), 644 F.2d 594.) The relevant statute is the Illinois Interest Act (Ill.Rev.Stat. 1979, ch. 74, pars. 1 et seq.) which provides that: "creditors shall be allowed to receive interest at the rate of 5% per annum for all monies after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received through the use of another and retained without the owner's consent; and

on money withheld by unreasonable and vexatious delay of payment."

[11] The only section of the statute conceivably applicable to the case at bar is section 2 which allows interest in the event of vexatious and unreasonable delay of payment due. It is clear that under Illinois law the conduct of litigation does not constitute such an unreasonable or vexatious delay. (Edens View Realty & Investment v. Heritage Enterprises (1980), 87 Ill.App.3d 480, 42 Ill.Dec. 360, 408 N.E.2d 1069.) The trial court was correct in its denial of plaintiff's motion for pre-judgment interest.

For the foregoing reasons the order of the circuit court of Winnebago County is affirmed in part, reversed in part, and remanded.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HOPF, J., concurring.

VAN DEUSEN, Justice, dissenting:

The majority's opinion sets aside a judgment in the amount of $400,000 entered in favor of the plaintiff on a jury verdict, and remands the matter for a new trial on the sole ground that there was apparent prejudice on the part of two jurors, namely, Ellen M. Bowers and Edward Benning. In his order denying defendant's post-trial motion, the trial court specifically rejected the defendant's contention that juror prejudice merited the granting of a new trial.

As the majority opinion points out, the supreme court has established a two-part standard for granting a new trial due to jurors' false testimony during voir dire.

A motion for a new trial should be denied unless it is established (1) that a juror answered falsely on voir dire and (2) that prejudice resulted therefrom. (Pekelder v. Edgewater Automotive Co. (1977), 68 Ill.2d 136, 139, 11 Ill.Dec. 292, 368 N.E.2d 900.) Implicit in the majority's opinion reversing the trial court's denial of the post-trial motion is a determination by this court that the trial judge's denial of the motion was an abuse of his discretion. I find no such abuse of discretion on the part of the trial court.

Defendant did not raise the issue of juror prejudice in its original post-trial motion, but did charge prejudice on the part of juror, Ellen M. Bowers, in its first supplement to its post-trial motion,

and charged prejudice on the part of juror, Edward Benning, in its second supplement to its post-trial motion.

In the two supplements, the defendant asserts, in substance, that Ellen M. Bowers and Edward Benning testified falsely during voir dire in that they falsely denied any connection with Rockwell International Corporation or involvement in any lawsuits with Rockwell International or its subsidiaries.

On appeal, the defendant has failed to file a transcript, a factual stipulation, or a bystanders report of the voir dire proceedings as required by Supreme Court Rule 323. (73 Ill.2d R. 323.) Defendant has instead attempted to establish a right to a new trial by a set of affidavits.

With reference to the juror, Ellen M.

Bowers, defendant submitted a single affidavit in support of its motion. It established that in 1977 the husband of Ellen M. Bowers had applied for employment at MGD Graphic Systems Group, that the rejection of his application prompted him to file a lawsuit against MGD Graphic Systems, a division of Rockwell International. No affidavit or other evidence was submitted to the trial court concerning the nature of any questions put to this juror or of her answers to any questions during the voir dire.

Other affidavits established that the other juror, Edward Benning, commenced working for MGD Graphic Systems in 1960; that North American Rockwell, now known as Rockwell International Corporation, took over MGD Graphic Systems in late 1968 or

early 1969; and that Edward Benning's employment terminated with MGD Graphic Systems in February 1970 because of hi attitude and lack of respect toward fellow workers. The affidavits also asserted that BEnning was aware of the acquisition of MGD Graphic Systems by Rockwell International.

An affidavit of Charles Banks, president of Rockwell International Corporation Credit Corporation established that Banks had interviewed several jurors in the case, including Benning. In the affidavit, Banks stated that during the interview, Benning indicated that he did not like Rockwell tools; that he had formerly worked form Rockwell as a foreman; that he questioned the credibility of Rockwell witnesses; and

that he thought the verdict was too low. According to the affidavits, Edward Benning's last contact with MGD Graphic Systems was some eleven years prior to the trial in question.

The defendant filed one more affidavit in support of its contention that Edward Benning answered falsely in voir dire. This fourth affidavit of a fellow juror, Maria A. Mayfield, was taken on February 13, 1981, three months after the trial. In her affidavits, Maria Mayfield stated that during the voir dire examination of the four jurors in her group, which included Edward Benning, the attorney for Rockwell International asked each of these four prospective jurors if any of them had ever worked for Rockwell International Corporation and that all of

the jurors in that group answered in the negative. The affidavit of Maria Mayfield also indicated that during jury deliberations, Benning had offered the opinion that plaintiff should be compensated in excess of two million dollars and that if plaintiff were to lose his job, his disability would make it very difficult to obtain other employment.

Only one affidavit, that of Maria Mayfield, refers to the voir dire examination. Other than this affidavit this court of review has no other record of the proceedings at the voir dire or during jury deliberations. It is a basic principle of appellate practice that a party who prosecutes on appeal has the duty of presenting to the reviewing court everything necessary to decide the issue

on appeal.

Marshall E. Winokur, Ltd. v. Shane (1980), 89 Ill.App.3d 551, 552, 44 Ill.Dec. 776, 411 N.E.2d 1142; Angel v. Angelos (1976), 35 Ill.App.3d 905, 907, 342 N.E.2d 748.

While this court has not had an opportunity to examine a report of the voir dire proceedings, the trial judge conducted and supervised the voir dire of Benning and Bowers. When ruling on the motion for the new trial, he may well have remembered the questions put to the jurors on this subject matter and their answers thereto. Because he was personally present during the voir dire, he would not have to accept the affidavit of the juror Mayfield as the unrebutted truth, particularly in view of the fact that it was taken some three months after trial and

following an ex parte communication with the defendant's representatives. See Chalmers v. City of Chicago (1982), 88 Ill.2d 532, 540-41, 59 Ill.Dec. 76, 431 N.E.2d 361.

The defendant's failure to present a proper record of the voir dire makes it relatively impossible for this court to determine if the trial court abused its discretion in denying the motion, and where the record is lacking, a reviewing court will indulge every presumption favorable to the judgment or order from which the party appeals. Schranz v. I.L. Grossman, Inc. (1980), 90 Ill.App.3d 507, 511, 45 Ill.Dec. 654, 412 N.E.2d 1378.

Furthermore, even assuming that the defendant's affidavits were true and accurate, the defendant has still failed

to present sufficient evidence upon which it can be concluded that the trial court abused its discretion in denying the defendant's post-trial motion. Edward Benning never did work directly for Rockwell International Corporation. Therefore, when defendant's counsel asked Benning whether he had any contact with Rockwell International, Benning may not have realized that his employment by MGD Graphic Systems some eleven years earlier might be considered as sufficient contact to require an affirmative response. Additionally, Benning's opinion, given during jury deliberations, concerning the size of the verdict that should be rendered in favor of the plaintiff, and his statement that in view of the plaintiff's injury, plaintiff would have difficulty

securing employment if he lost his job, could not be considered as any real indication of prejudice which may have affected the verdict reached by the jury. Under these circumstances, the trial court could have properly concluded that Benning did not give false testimony at the voir dire, and secondly, that even if the answer could be considered false, no prejudice resulted therefrom.

I would affirm the trial court's judgment in favor of the plaintiff.

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illinois 60120

September 2, 1982

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 81-474

David Schulz, plaintiff-appellee-cross-appellant, v. Rockwell Mfg. Co., Rockwell International Corp., defendants-appellants,

Conditional motion by Appellee to file counter affidavits and objections thereto by Appellant. Conditional motion by Appellee denied.

Petition for rehearing, or in the alternative for Certificate of Importance by Plaintiff-Appellee denied.

LOREN J. STROTZ, Clerk

Robert A. Fredrickson
Thomas E. Kluczynski
Bernard P. Reese, Jr.

IN THE
SUPREME COURT
OF THE STATE OF ILLINOIS

October 13, 1983

Reese, Reese & Bagley
Attorneys at Law
979 N. Main Street
Rockford, IL 61103

In re: David Schulz, petitioner vs. The Honorable George W. Lindberg, etc., et al., respondents. No. 57398

Counsel:

We have today received and filed an order entered by the Court denying the motion by petitioner for leave to file a petition for an original writ of mandamus, in the above entitled cause.

Very truly yours,

JULEANN HORNYAK

Clerk of the Supreme Court

JH:th

IN THE
SUPREME COURT
OF THE STATE OF ILLINOIS

November 30, 1982

Mr. Bernard P. Reese, Jr. Attorney at Law
979 N. Main St.
Rockford, IL 61103

No. 57371

David Schulz, petitioner, vs. Rockwell Manufacturing Co., etc., respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

JULEANN HORNYAK

Clerk of the Supreme Court

IN THE
SUPREME COURT
OF THE STATE OF ILLINOIS

January 19, 1983

THE COURT HAS ENTERED THE FOLLOWING ORDER IN THE CASE OF: Gen. No. 47371

David Schulz, petitioner, vs. Rockwell Manufacturing Company, Rockwell International Corporation, respondent.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal, or, in the alternative, to grant a rehearing on petition for leave to appeal, and for stay of mandate pending ruling on this motion is denied.

The mandate has today been issued to the Clerk of the appellate Court, Second District.

cc: Reno, Zahm, Folgate
Epton, Mullin, Segal

IN THE
SUPREME COURT
OF THE STATE OF ILLINOIS

February 17, 1983

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 57371

In re: David Schulz vs. Rockwell Manufacturing Company, etc.

The motion by petitioner for a specific ruling on the petition for leave to appeal, as a matter of right is denied.

JULEANN HORNYAK, CLERK

cc: Reno, Zahm, Folgate, Lindberg & Powell
Epton, Ullin, Segal & Druth
All Justices

APPEAL TO THE
UNITED STATES SUPREME COURT
FROM THE
SUPREME COURT OF ILLINOIS

DAVID SCHULZ	)	
	)	
Plaintiff-Appellant,	)	SUPREME
	)	COURT
v.	)	NO. 57371
	)	
ROCKWELL MANUFACTURING COMPANY,	)	
	)	
	)	NOTICE OF
Defendant-Appellee,	)	APPEAL

1. This appeal is taken by David Schulz, Plaintiff.

2. An appeal is taken from the judgment of the Supreme Court of Illinois in denying both an appeal as a matter of right (final order February 17, 1983) and the denial by the Supreme Court of Illinois of that appeal in the alternative as a Petition for Leave to Appeal under Illinois Supreme Court Rule 317 (final

order January 19, 1983) thereby affirming the judgment of the Appellate Court of Illinois Second District entered July 16, 1982 which reversed a judgment of the 17th Judicial Circuit Court, Winnebago County, Illinois in the amount of $400,000.00 in favor of the Plaintiff.

3. This appeal is taken pursuant to the provisions of 28 U.S.C. Sec. 1257(2) and Sec. 2101(c).

4. This Notice of Appeal is filed with the Clerk of the Supreme Court of Illinois with a duplicate original copy thereof being filed with the Clerk of the Appellate Court of Illinois Second District.

DAVID SCHULZ, Plaintiff-Appellant

BY: REESE, REESE & BAGLEY

BY: /s/ BERNARD P. REESE, JR.

APPEAL TO THE
UNITED STATES SUPREME COURT
FROM THE
SUPREME COURT OF ILLINOIS

DAVID SCHULZ	)	
	)	
Plaintiff-Appellant,	)	SUPREME
	)	COURT
v.	)	NO. 57371
	)	
ROCKWELL MANUFACTURING COMPANY,	)	
	)	
	)	
Defendant-Appellee,	)	

PROOF OF SERVICE

This is to certify that the undersigned has served one copy of Plaintiff-Apellant's Notice of Appeal upon the following attorneys of record by placing said copy with the United States Post Office, postage prepaid, this 11th day of April, 1983, to-wit:

Mr. Robert A. Fredrickson
Mr. Thomas E. Klyczynski

/s/ BERNARD P. REESE, JR.

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS SUPREME COURT RULES 321. (Supreme Court Rule 321). Contents of the Record on Appeal

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law trial court record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less. The trial court record includes any report of proceedings prepared in accordance with Rule 323 and every other document filed and judgment and order entered in the cause. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court. No assignment of errors or cross-errors is necessary. Amended, eff. Oct. 15, 1979.

323. (Supreme Court Rule 323). Report of Proceedings

(a) Contents; Preparation. A report of proceedings may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal. The report of proceedings shall include all the evidence pertinent to the issues on appeal.

Within 14 days after the filing of the notice of appeal the appellant shall make a written request to the reporter to prepare a transcript of the proceedings that he wishes included in the report of proceedings, and a copy of the request shall be served upon every other party with the docketing statement required by Rule 303(g). Within 7 days after service on the appellee of the docketing statement and a copy of the request for transcript the appellee may serve on the appellant a designation of additional portions of the proceedings that the appellee deems necessary for inclusion in the report of proceedings. Within 7 days after service of such designation the appellant shall request the reporter to include the portions of the proceedings so designated or make a motion in the trial court for an order that such portions not be included unless the cost is advanced by the appellee.

(b) Certification and Filing. A report of proceedings shall be submitted, upon notice given by the party seeking certification, to the judge before whom

the proceedings occurred or his successor (or if that is impossible because of his absence or his sickness or other disability, then to any other judge of the court) for his certificate of correctness, and shall be filed, duly certified, in the trial court within 49 days after the filing of the notice of appeal. If, however, the parties so stipulate, a report of proceedings may be filed without certification. If more than one appeal is taken, a single report of proceedings shall be submitted, certified, and filed within 49 days after the filing of the final notice of appeal.

(c) Procedure If No Verbatim Transcript Is Available. If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 14 days after the notice of appeal is filed. Within 28 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included

in the record on appeal.

329. (Supreme Court Rule 329). Amendment of Record on Appeal

The record on appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule. Material omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court, or by the reviewing court of a judge thereof. Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court and the record made to conform to the truth. If the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant. If necessary, a supplemental record may be certified and transmitted. Amended May 28, 1982, effective July 1, 1982.

66. (Supreme Court Rule 66). Disqualification for and Disclosure of Financial Conflicts of Interest

A judge, as soon as practicable, shall disqualify himself in any case if (a) he or members of his immediate family (spouse or minor children residing with him) have any substantial financial interest in the result of any ruling or decision therein or (b) he or members of his immediate

family have any substantial financial interest in any corporation or busines which is a party in said matter or which is identified as provided in this Rule as having a substantial, direct or indirect interest in the outcome of the litigation. A judge cannot rid himself of this responsibility by consent of counsel or the parties to the case. If a judge has any financial interest in any corporation which is a party to the litigation or is identified as having an interest therein, which he believes to be too insubstantial to require disqualification, he shall make a full disclosure of such interest to the parties. In any case in which there are persons or corporations, not parties of record, who have a substantial, direct or indirect, financial interest in its outcome, each party may, within 60 days of the filing of his initial pleading, file a document identifying those persons or corporations. It shall be the duty of the clerk of the court to bring any such document which has been filed to the attention of any judge before whom that case is being heard. Adopted Jan. 30, 1970, effective March 15, 1970. Amended, effective July 15, 1976.

ILLINOIS REVISED STATUTES
CHAPTER 37 - COURTS

35. Mandamus and other writs

§ 11. Each branch of the appellate court may issue the writ of mandamus to cause a proper record to be duly certified, or made and certified, or to cause any other act to be done which may be necessary to enforce the due administration of justice in all matters, suits or proceedings, which could or might by appeal or in any other lawful manner, be brought within the court's jurisdiction; upon petition filed, the clerk of the branch appellate court shall issue summons, and like proceedings shall be had as in other cases of mandamus. The appellate court may also issue writs of certiorari and all other writs not prohibited by law, which may be necessary to enforce the due administration of justice in all matters within the appellate court's jurisdiction. Such writs or process shall run in the name of the People of the State of Illinois, and bear test in the name of the presiding judge of the division of the branch appellate court from which it may issue, be signed by the clerk, dated, when issued, sealed with the seal of the court, and made returnable according to law. Amended by P.A. 81-260,§1, eff. Aug. 28, 1979.